

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4926 of 1987

Date of decision: 1-12-1997

For Approval and Signature

The Hon'ble Mr. Justice S. K. KESHOTE

1. Whether Reporters of Local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of the judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

NARESHKUMAR CHHAGANBHAI NAYAK

Versus

STATE OF GUJARAT

Appearance:

MR HD VASAVADA for Petitioners

Mr. D. A. Bambania for Respondent No. 1, 2, 3

CORAM : MR. JUSTICE S. K. KESHOTE

Date of decision 1-12-1997

C.A.V. JUDGEMENT

The petitioners, in all sixteen in number, have challenged in this petition the alleged action of the respondents in giving artificial break in their service and also in not offering them salaries equivalent and at par with the State employees who are performing same duties as the petitioners. The petitioners were given appointment from time to time as peon/ peon cum drivers for fixed term on daily wages. Though complete details of appointments of the petitioners were not given by the petitioners in this special civil application, from the orders which are produced by them it certainly comes out that they have been given appointment for 29 days on daily wages. In para 9 of this special civil application the petitioners' case is that some of them were appointed right from 1981, and some of the petitioners have worked with the respondent State for more than 5 to 7 years. All these are incomplete and vague statements.

2. The counsel for the petitioners raised following contentions in this special civil application. First, as the petitioners are working on daily wages they have acquired right of regularisation in service. Next contention is made that the respondents have made hostile discrimination..R

this plea has been given in para 5 of the special civil application. The petitioners gave out reference to the case of four or five persons whose appointments were said to be regularised. Further contention is raised that the petitioners are working for 8 hours, but they have been paid only daily wages and they claim for parity on the basis of the principles of equal pay for equal work. Last contention has been raised that posts are vacant and as such the respondents may be directed to regularise their services. In support of his contention the learned counsel for the petitioners placed reliance on the decisions in the case of:

1. Dharwad Dist. P.W.D. Literate Daily Wage Employees Association vs. State of Karnataka, rep.R

2. H.C.Puttaswamy vs. Hon'ble Chief Justice of Karnataka, reported in AIR 1991 SC 295; and

3. unreported decision of the Supreme Court in Civil Appeal No.4058-64/88 dated 15th November,

1988.

3. On the other hand the learned counsel for respondents contended that the petitioners have no case whatsoever in their favour. The petitioners were given fixed term appointment on daily wages as and when work was available. They were not working continuously. Their appointments were made without following any procedure or rules. All appointments were temporary, adhoc and for fixed term and as such no right, much less right of regulation, has accrued to the petitioners. It has further been contended that appointment to class IV posts other than secretariat service is regulated under the Rules framed under Article 309 of the Constitution of India, and these appointments were de hors the said rules.

4. It has next been contended that there is no question of any discrimination as alleged by the petitioner. The persons whose names have been referred in this special civil application and particularly in para 5 thereof were given regular appointment after following necessary procedure for recruitment. Their names were called from employment exchange and after completing necessary formalities they were given appointment. Further contention has been raised that as the petitioners were given appointment only on daily wages and on fixed terms, the same would come to an end by afflux of time. The petitioners being daily wagers have no right whatsoever and they cannot claim any parity in the pay-scale with the employees who have been given regular appointment. Lastly, it is contended that even if the posts are available then too they have not acquired any right of regularisation. The petitioners' services come to an end by afflux of time. Now they are working as daily wagers as this Court protected them by way of grant of interim relief.

5. I have given my thoughtful consideration to the submissions made by the learned counsel for the parties.

This writ petition has come up for admission before this Court on 22nd September, 1987 when this Court passed the following order:

"Rule. Notice as to interim relief returnable on 28-9-1987. Direct service permitted. Ad interim relief in terms of para 17(c) up to 30-9-1987."

Later on the interim relief granted by this court was modified in terms that it will be open to the respondents to terminate the services of the petitioners on any lawful ground and in lawful manner. Subject to the aforesaid clarification ad interim relief granted earlier was ordered to be continued. The respondents wanted to terminate the

services of the petitioners in lawful manner and at that point of time the petitioners approached this court by filing civil application No.122/89; and this court has protected the petitioners. So it is correct to say that the petitioners are continuing in service only under the interim relief granted by this court.

6. Learned counsel for the petitioners is unable to show to court that the appointments were given to the petitioners under the Rules framed under Article 309 of the Constitution of India. Not only this, he is unable to show that these appointments of the petitioners were made in consonance with the provisions of Articles 14 and 16 of the Constitution. The counsel for the petitioner admits that the petitioners were on fixed term appointment on daily wages. Further grievance is that it was illegal and arbitrary on the part of the respondents to give break in the service of the petitioners. So it is not in dispute that the petitioners were given appointments on daily wages and for fixed term. Division Bench of this Court (Coram: B.N.Kirpal, CJ (as he then was) and H.L.Gokhale, J) in the case of Bhanmati Tapubhai Muliyi vs. State of Gujarat, reported in 1995 (2) GLH 228, held that appointments which have been given for fixed term come to an end by efflux of time. In such appointments, the authority is not required to make any order of termination. No notice is required to be given to the appointee. In the case of Madhya Pradesh Hatha Shilpa Vikas Nigam Ltd., vs. Devendra Kumar Jain, reported in JT 1995(1) SC 198, the Supreme Court held that a temporary Government servant does not become permanent unless he acquires that capacity by force of any rule or is declared as permanent servant. The appointments of the petitioners were de hors the recruitment rules. Learned counsel for the petitioners failed to produce on record of this special civil application any rule framed under Article 309 of the Constitution or any other resolution of the Government which provides for regularisation of such category of employees. Appointments to class IV posts are to be made in accordance with the rules framed under Article 309 of the Constitution of India or under the Resolutions framed by the Government in exercise of the constitutional powers under Article 162 of the Constitution. Merely because these are class IV posts the petitioners cannot justify their entry in service. Any appointment made de hors rules or without following the provisions of Articles 14 and 16 where there are no statutory rules or regulations framed are illegal and unconstitutional. In our country it is unfortunate that there is wholesome unemployment and I find sufficient merit in the contention of the learned counsel for the petitioners that the citizens are ready to accept any term of

appointment, but at the same time this court cannot be oblivious of the fact that the framers of the Constitution of the country enacted therein Articles 14 and 16. What these Articles 14 and 16 postulate is that in the public employment all eligible persons should get equal opportunity of right of consideration for employment. While considering the case of daily wagers for their regularisation in service this court has to look into the fact that many persons who are not having their godfathers or some helping hand in the department concerned have been deprived of their opportunity of consideration for appointment. Those persons who have means and persons to support in the Department could get back door entry in employment. These persons will allow them to continue to work for number of years and then they will come up before this Court with the prayer for regularisation. Any appointment which is de hors the rules or constitutional provisions will not confer any right whatsoever to the holder of the post. Any benefit given to such person by the court and more so, sitting under Article 226 of the Constitution of India, will perpetuate the illegality. Despite catena of authorities of the Supreme Court and this Court the departments are making indiscriminately temporary appointments, and those appointments are being made de hors the rules and the Constitutional provisions. It is true that in many of the cases their Lordships of Supreme Court have given direction for regularisation of the services of those classes of persons who were initially appointed on temporary basis or on daily wages and worked for years together. If we go by the subsequent change of law which is now brought by the Supreme Court as reflected in the recent decisions, this class of persons cannot be given any protection whatsoever. Continuation of the petitioners howsoever long it may be on the basis of fixed term appointment with some break will not entitle them for any benefit whatsoever including scale of pay which is given to the employees who have been regularly appointed on the posts.

7. In the case of State of Himachal Pradesh vs. Nodharam, JT 1996(1) SC 220, the Hon'ble Supreme Court, in the facts and circumstances of the case where the respondents therein were engaged on daily wages held that when the project is completed and closed, due to non availability of funds the employees would go along with closure. The High Court was not right in giving directing to regularise them or to continue them in other places. No vested right is created in temporary employment. Direction cannot be given to regularise their services in absence of any existing vacancy nor can direction be given to the State to create posts in nonexistent establishment. The court

would take pragmatic approach not to give such direction. In the present case also I do not find anything on record that permanent posts are available in the Department. Moreover, even if it is taken that posts are available, still the petitioners will not get right of regularisation on the basis of their continuation in the Department on fixed term appointment which was made de hors rules and constitutional provisions.

8. Reference may have to be made to another decision of the Supreme Court in the case of State of Himachal Pradesh vs. Sureshkumar Varma, reported in 1996 (VII) SCC 562. In that case their Lordships of the Supreme Court repelling the contention of the counsel for the respondents therein that there were vacancies and therefore the respondents are entitled to be continued in service held that the vacancies required to be filled in accordance with the rules and by candidates who are otherwise eligible and entitled to apply for when recruitment is made and seek consideration for their claim on merits.

9. In the result this special civil application fails and the same is dismissed. However, it is made clear that as and when the respondents undertake to make selection to the category of Class IV employees or driver, then in case the petitioners apply for the posts, their candidature may not be rejected only on the ground of age eligibility, subject to the condition that the petitioners or the concerned petitioner was within age limit when he was given first fixed term appointment on daily wage basis. Rule discharged. Interim relief granted earlier stands vacated. No order as to costs.

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